FILED
APR 3 1992

No. 91-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS INDEPENDENT PETROCHEMICAL CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

Of Counsel:

JOHN H. GROSS
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017
(202) 850-0700

RALPH SPRITZER
ARIZONA STATE UNIVERSITY
College of Law
Armstrong Hall
Tempe, AZ 85287-7906
(602) 965-6181

JEROLD OSHINSKY
STEPHAN G. WEIL
(Counsel of Record)
ANDERSON KILL OLICK & OSHINSKY
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 728-3100

TIM E. SLEETH
SMITH & HULSEY
1800 Florida National Bank Tower
225 Water Street
Jacksonville, FL 32202
(904) 359-7700

Attorneys for Respondents, Independent Petrochemical Corporation, et al.

April 3, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a court of appeals considering an unsettled question of state law that has been previously considered by a coordinate court of appeals—in the "home circuit"—is bound to follow the latter court's ruling even if that ruling is premised upon a clear misreading or misapplication of the guiding principles of state law.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE STANDARD OF DEFERENCE GIVEN BY THE COURT BELOW TO THE "HOME CIRCUIT" IS IN FULL ACCORD WITH PRONOUNCEMENTS OF THIS COURT	5
II. THERE IS NO CONFLICT OF DECISIONS AND NO OCCASION FOR REVIEW BY THIS COURT	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Abex Corp. v. Maryland Casualty Co., 790 F.2d 119 (D.C. Cir. 1986) 9

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 6, 7

Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) 3, 7, 9

Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) 5, 8-11

General Box Co. v. United States, 351 U.S. 159 (1956) 6

Huddleston v. Dwyer, 322 U.S. 232 (1944) 6

Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina, 801 S.W.2d 382 (Mo. Ct. App. 1990) 8

Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) 10-11

Palmer v. Hoffman, 318 U.S. 109 (1943) 5-6

Propper v. Clark, 337 U.S. 472 (1949) 6

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 6

Runyon v. McCrary, 427 U.S. 160 (1976) 6

Salve Regina College v. Russell, —— U.S. ——, 111 S. Ct. 1217 (1991) 6-7

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 6

STATUTES

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1252

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS INDEPENDENT PETROCHEMICAL CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

STATEMENT OF THE CASE

In November, 1983, respondents, Independent Petrochemical Corporation ("IPC"), Charter Oil Company ("Charter") and The Charter Company ("TCC")[1] (here-

---

[1] IPC and Charter are wholly-owned subsidiaries of TCC, which is a publicly-traded corporation. A majority (50.5%) of TCC's voting stock is owned by American Financial Corporation, a closely-held corporation. Subsidiaries of TCC, other than those which are wholly-owned, are Alaska Oil Company, Bahamas Oil Refining Company, Borco Towing Company Limited, Borco Desulferization Company, Borco Marine Company, Freeport Trading Co., Limited, and Marine Agents and Brokers, Limited.

inafter collectively referred to as IPC), filed a diversity action in the District of Columbia seeking, *inter alia*, a declaration of entitlement to insurance coverage for liability which it may incur under provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, for sums representing the cost of remedying soil contamination for which it may be legally responsible. The harm occurred at sites in Missouri, and Missouri law is applicable to the relevant contracts of insurance. The insurance contracts in issue typically provide:

> The [insurance] company will pay on behalf of the insured [Independent Petrochemical] all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damages to which this insurance applies, caused by an occurrence.

The policies do not define the term "damages" and one issue raised by IPC's suit was whether its liability for remediation of soil contamination constitutes damages covered by its insurance. There are no appellate decisions in Missouri addressing that specific issue and Missouri has no provision for certification.

Two weeks after IPC filed its suit, Continental Insurance Company filed suit seeking relief from its coverage obligations, in the United States District Court for the Western District of Missouri, against Northeastern Pharmaceutical and Chemical Co. ("NEPACCO"), which had claims against its insurers similar to those of IPC. NEPACCO had been defunct since the early 1970's, and did not appear in response to Continental's complaint. The NEPACCO case proceeded more expeditiously than the present case, and resulted in a five-to-three decision by the Court of Appeals for the Eighth Circuit in favor of Continental, before any decision was entered in the present case.

Although the NEPACCO court's majority acknowledged that "under Missouri law the language of an insurance policy is to be given the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy," it concluded that "damages" has a "legal, technical meaning" in the insurance context; that it refers to compensatory relief but does not include equitable monetary relief; and that the government's imposition of liability for environmental cleanup costs is essentially equitable. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-986 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) ("*NEPACCO*").

The court below recognized that a "home circuit's view of state law is entitled to deference" (Pet. App. 8a). "Deference," it added, "is one thing; blind adherence quite another." (Pet. App. 9a). "The decision of the home circuit need not be followed if it has *clearly misread* state law." *Ibid.* (Emphasis in original). This, it said, is that "rare" case. *Ibid.*

The reasons for the conclusion by the court below that the Eighth Circuit had clearly misread Missouri law may be summarized briefly. "As the NEPACCO majority itself acknowledged, the lay insured would not distinguish between legal and equitable relief when construing damages." (Pet. App. 10a). "At least one Missouri trial court has interpreted 'damages' this way in a case involving the same insurance policy language at issue here." *Ibid.* Missouri jury instructions on the issue of damages in negligence actions reflect the view that the cost of repairing or restoring property is a form of damages. (Pet. App. 11a). Research "reveals that, with the exception of *NEPACCO*, in every case in which the operative state's rules of insurance contract interpretation required—as Missouri's does—resort to the common and ordinary understanding of language, the word 'damages' has been construed to cover reimbursement for environmental response costs. . . ." (*Ibid.*) "Technical meaning

is the exception rather than the rule in Missouri, and the insurers therefore had to show that the parties intended to be bound by it." (Pet. App. 12a). This they failed to do.

SUMMARY OF ARGUMENT

The petitioners ask this Court to impose a new standard of deference, without any support in precedent, requiring that a federal circuit court of appeals decision on an unsettled question of the law of a state within that circuit (the "home circuit") be followed by all federal courts until such time as that decision is overruled by the state's highest court or the legislature of the state in question. In particular, they assert that another circuit is bound to follow the "home circuit" decision even when it finds that the "home circuit" clearly misread state law. There is no basis for adoption of such a rule.

The court below carefully reviewed the previous decision of the Eighth Circuit and the relevant Missouri precedents. After a thorough and searching assessment, it concluded that it had to reject the Eighth Circuit decision as clearly contrary to Missouri law. That procedure was in accord with this Court's teachings on the appropriate deference to be given to federal court decisions on undecided questions of state law.

The decision of the court below also was in accord with the law of the various circuits on the appropriate degree of deference to be shown to decisions of a sister circuit court. Thus, the decision of the court below does not raise any conflict between the circuits. Therefore, there is no ground for review by this Court, and the petition for certiorari should be denied.

ARGUMENT

I. THE STANDARD OF DEFERENCE GIVEN BY THE COURT BELOW TO THE "HOME CIRCUIT" IS IN FULL ACCORD WITH PRONOUNCEMENTS OF THIS COURT

Petitioners ask this Court to grant review on the ground that there is a conflict between the decision below and the decision of the Second Circuit in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) ("*Factors*"). The court below, they point out, declined to follow the "home circuit" because it concluded that the court had "clearly misread" Missouri law. The Second Circuit, petitioners assert, has a "standard of 'conclusive' deference," subject only to very limited exceptions. Specifically, they claim that a finding that a "home circuit" decision "clearly misread" state law is not grounds for declining to follow that decision in the Second Circuit's view. This Court, they urge, should impose the Second Circuit's "conclusive" standard on all federal circuit courts of appeals.

Before addressing petitioners' reading of *Factors* and its claim of an inter-circuit conflict of decision (with which we disagree), we stress at the outset that this Court has repeatedly considered, over the course of the last half-century, the cognate question of the measure of deference that it will accord to decisions of courts of appeal on issues of local law. This Court's decisions demonstrate that the standard petitioners ask this Court to adopt would be a marked departure from anything it previously has approved. While there are minor variations in the Court's articulation of the standard, this Court never has said that it will regard the determination of state law by a federal court of appeals as conclusive.

The Court consistently has rejected any such approach, either implicitly or expressly. *See, e.g., Palmer v. Hoff-*

man, 318 U.S. 109, 118 (1943) (will follow ruling of lower federal courts "except on a plain showing of error"); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily" will accept but will review "in exceptional cases"); *Propper v. Clark*, 337 U.S. 472, 486-487 (1949) ("hesitant to overrule" unless "shown to be unreasonable"); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956) ("ordinarily accept"); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960) (will accept if not "clearly erroneous or unreasonable"); *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("not persuaded that the Court of Appeals was mistaken"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) ("*Brockett*") ("The rule [of deference] is not ironclad, however, and we surely have the authority to differ with the lower federal courts . . ."); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 224 (1985) (accepting "reasonable rendering of state law, particularly when no party has challenged it").[2]

There is no sound reason to suggest that a court of appeals' ruling on a question of local law has a greater presumption of correctness when it comes before a sister court of appeals than when it comes to the attention of this Court. Certainly, this Court has never intimated that in either case there is a requirement of blind adherence. Indeed, the fact that this Court has "limited resources in the exercise of its discretionary jurisdiction" underscores the obligation of courts of appeals to give careful consideration to issues of local law. *Salve Regina College v. Russell*, —— U.S. ——, 111 S. Ct. 1217, 1223

---

[2] *Cf. Salve Regina College v. Russell*, —— U.S. ——, 111 S. Ct. 1217, 1225 (1991), holding that courts of appeals must review *de novo* district courts' determinations of state law in diversity actions, and noting that "the bases of state law are as equally communicable to the appellate judges as they are to the district judge." Appellate judges of a "home circuit" and appellate judges of another circuit, likewise, are equally able to receive communications of the bases of state law.

n.3, 1224 (1991) (defining the standard of review of district court decisions on issues of state law.)

Consonant with this Court's pronouncements, the court below expressly recognized that a decision of the "home circuit" is entitled to a strong measure of deference and is ordinarily to be followed. It also recognized, however, that the rule of deference is not "ironclad" (*Brockett, supra*) and does not require "blind adherence" in the "rare" case where the home appellate court has "clearly misread state law." (Pet. App. 9a).

It is evident, moreover, that the court below did not give mere lip service to the rule of deference. We have only briefly identified in the Statement (*supra*, pp. 3-4) the salient points which led it to conclude that the Eighth Circuit had plainly misapplied governing principles (those relating to interpretation of contracts of insurance) of Missouri law. We do not elaborate on the state law issue since the only question raised by the petition relates to the standard of deference. We do, however, invite attention to the portions of the opinion that examine the underlying issue (see, especially, Pet. App. 9a-14a) because they demonstrate that, far from lightly rejecting the *NEPACCO* ruling, the court did so only after a thorough and searching assessment.[3]

---

[3] Although petitioners assert that the court below "cited no existing Missouri precedent that the Eighth had overlooked, . . . nor any subsequent ruling by the Missouri Supreme Court, nor any other Missouri appellate court addressing the issue" (Pet. 7), the court below cited numerous Missouri appellate cases which supported its finding that awards of the costs remedying environmental harm are "damages" covered by the insurance policies sold by petitioners, decisions which had been ignored by the *NEPACCO* majority. *Compare*, *NEPACCO*, 842 F.2d at 985-87, with the opinion below, Pet. App. 9a-12a. The court below noted those decisions as further support for its central holding that *NEPACCO* failed to apply the Missouri law principles which it did recognize. The court below also cited a subsequent Missouri appeals court decision holding that the term "damages" in an insurance policy is to be read broadly, as

II. THERE IS NO CONFLICT OF DECISIONS AND NO OCCASION FOR REVIEW BY THIS COURT

A. Petitioners pin their application for the writ upon the Second Circuit's decision in *Factors*, which they interpret as precluding a court of appeals from declining to follow a "home circuit" on the ground that the latter court has "clearly misread" state law. On the basis of this interpretation, they say that the decision below is in conflict and urge this Court to adopt their version of the Second Circuit's ruling.

The *Factors* opinion states (652 F.2d at 283):

> A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superseded by a later pronouncement from state legislature or judicial sources . . . or that prior state court decisions had been inadvertently overlooked . . . . Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule.

Explaining the notion of "clear signals," the *Factors* opinion concludes that "We should defer to the views of the Sixth Circuit unless we can point to a *clear basis* in Tennessee law for predicting that the Tennessee courts . . . would conclude that the Sixth Circuit's prediction was incorrect." *Ibid.* (emphasis added).

---

including all forms of monetary liability, including an award of attorneys' fees. Pet. App. 14a, citing *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina*, 801 S.W.2d 382, 393 (Mo. Ct. App. 1990).

Several years after *Factors* was decided, the District of Columbia Circuit had before it a case, which, like the instant case, involved interpretation of a provision in an insurance contract. The contract was governed by New York law and the Second Circuit, as it happened, had passed upon the same issue. Judge Edwards, who also was a member of the panel in the instant case, expressed his agreement with Judge Newman's *Factors* opinion (quoting from the passages we have set forth above). He then set forth his understanding of that opinion:

> For these reasons, we will defer to the local circuit's view of the law of a state in its jurisdiction when that circuit has made a reasoned inquiry into state law, unless we are convinced that the court has ignored clear signals emanating from the state courts. Only when we are certain that the pertinent circuit has *clearly misread* state law would it make sense to reject that circuit's view of state law. In such a case, our adoption of a clearly incorrect reading of state law would do nothing to prevent forum shopping. Litigants would still choose a federal forum whenever the circuit's reading of state law is more favorable than that actually adopted by state courts. We are convinced, however, that such a clear misreading of state law will rarely occur.

Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 125-126 (D.C. Cir. 1986) ("*Abex*") (emphasis in original).[4]

In the instant case, the court below followed its *Abex* ruling, stating that the *NEPACCO* decision was entitled to deference and that it would decline to follow it only if the Eighth Circuit had ignored "clear signals" from the state courts or "clearly misread" state law. (Pet. App. 9a).

Although the District of Columbia Circuit has expressed its approval of the approach it finds indicated by *Factors*, petitioners argue that the circuits actually are in con-

---

[4] The *Abex* court did in fact defer to the Second Circuit's ruling on the state law question at issue.

flict. They would read Judge Newman's opinion as permitting a departure from a "home circuit" ruling only when that circuit overlooked prior state court decisions or when a superseding state legislative enactment or a state judicial pronouncement has intervened between the "home circuit's" ruling and the sister circuit's confrontation of the state law issue. To be sure, these are Judge Newman's examples of instances in which departure would be clearly appropriate. *See Factors*, 652 F.2d at 282, 283. They need not be read, however, as the exclusive reasons. There may be other clear signals, as the concluding language of his opinion recognized, providing "a clear basis in [state] law for predicting" that the state courts, if confronted with the same issue, would not act in accordance with the "home circuit's" prediction. 652 F.2d at 283.

That basis is present if a court of appeals, while not overlooking the principles of state law that provide guidance, fails to follow them because it mistakenly believes that another principle governs. A decision clearly misreading or misapplying state law has no more claim to binding effect upon a coordinate court than one that has completely overlooked the applicable principles of state law.

B. However one reads the *language* of *Factors*, it is plain that there is no *holding* by the Second Circuit that a coordinate court of appeals is bound to follow a clearly erroneous reading of state law by the "home circuit." In *Factors* the Second Circuit was called upon to predict how the courts of Tennessee would decide, under that State's common law, whether a person has a protected interest in publicizing his name and likeness after his death. The Sixth Circuit previously had considered the same question. *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). That circuit found (and the Second Circuit later agreed) that "Tennessee courts have not addressed this issue directly or indirectly, and we

have no way to assess their predisposition." 616 F.2d at 958.

The Sixth Circuit therefore felt obliged to make its prediction "in the light of practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presumptions concerning death, privacy, inheritability, and economic opportunity." *Ibid.* Speaking for the Second Circuit, Judge Newman thereafter observed that "reasonable minds" might differ "as to the preferable course that the common law of Tennessee ought to follow" (652 F.2d at 282), but that deference should be accorded to the Sixth Circuit's assessment unless there was "clear basis" in Tennessee law for concluding that its "prediction was incorrect." *Id.*, at 283. "[W]e are unable to find any such indication in Tennessee law . . . ." *Ibid.*

Factors, then, is a case, perhaps unique, in which the two federal courts that examined a determinative issue of state law both declared themselves unable to find any guidance whatever in the State's jurisprudence. Whatever the implications of selected passages in Judge Newman's opinion, *Factors* cannot constitute a holding that a coordinate court of appeals is bound to accept a clearly erroneous determination of state law by the "home circuit." Neither this Court nor any court of appeals ever has held that. Such a holding, moreover, could not be squared with this Court's considered rulings as to the appropriate standard of deference. (Point I, *supra*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

JOHN H. GROSS
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017
(202) 850-0700

RALPH SPRITZER
ARIZONA STATE UNIVERSITY
College of Law
Armstrong Hall
Tempe, AZ 85287-7906
(602) 965-6181

April 3, 1992

JEROLD OSHINSKY
STEPHAN G. WEIL
(*Counsel of Record*)
ANDERSON KILL OLICK & OSHINSKY
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 728-3100

TIM E. SLEETH
SMITH & HULSEY
1800 Florida National Bank Tower
225 Water Street
Jacksonville, FL 32202
(904) 359-7700

Attorneys for Respondents, Independent Petrochemical Corporation, et al.